In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1124

BONNIE J. BISSELL, ET AL., PETITIONERS

v.

EDMOND J. MCELLIGOTT AND UNITED STATES OF AMERICA

SYLVIA LYNN GAMPHER, ET AL., PETITIONERS

v.

EDMOND J. MCELLIGOTT AND UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

The sole question presented by these Federal Tort Claims Act cases is whether Sgt. Tompkins was acting within the scope of his employment as a member of the United States Air Force when he was involved in the automobile accident from which these claims arise. Under 28 U.S.C. 1346(b), that question is to be answered "in accordance with the law of the place where the act or omission occurred." *Williams* v. *United States,* 350 U.S. 857.

Applying the law of Missouri, where the accident occurred, to the undisputed facts, the district court concluded that the United States was not liable. It held that "the right of the employer to control the physical acts or movements of the employee at the very moment of the occurrence" (Pet. App. A4) is essential to liability under the Missouri law of respondeat superior and had not been established by petitioners. On the contrary, the district court found "that Sgt. Tompkins had complete freedom to select the sort of transportation that he was to utilize"; that his use of his private car was not for the convenience of the government; that he could follow any route he wished to take; and that he had stopped en route to see his wife in Topeka, Kansas, and his mother-in-law in Kansas City, Missouri (Pet. App. A5; Pet. 4). The court of appeals concurred in the district court's analysis of the Missouri law as applied to the facts presented.

The decision below is not in conflict with the decisions in other circuits. The different results reached in some other cases defining the "scope of employment" (see Pet. 5) merely reflect differences in the applicable State law. Moreover, the analysis of the Missouri doctrine of respondeat superior by the two courts below does not present any issue warranting further review by this Court. See *Propper* v. *Clark*,

337 U.S. 472, 486–487; *Estate of Spiegel* v. *Commissioner*, 335 U.S. 701, 707–708.*

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

MAY 1967.

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* Petitioners also contend, in effect, that there should be a special and broader area of governmental liability for torts of military personnel, as distinguished from torts committed by federal civilian personnel. The short answer to this contention is that the "scope of employment" is measured, in both situations, by the *respondeat superior* law of the State where the alleged negligence took place. *Williams* v. *United States*, 350 U.S. 857; *United States* v. *Campbell*, 172 F. 2d 500, 503 (C.A. 5), certiorari denied, 337 U.S. 957. As pointed out by the court below, "the unique control which the Government maintains over a soldier [through the Uniform Code of Military Justice] has little if any bearing upon determining whether his activity is within the scope of his employment" (Pet. App. A6).

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